No. 99 1841 MAY 16 2000

In the

OFFICE OF THE CLERK

Supreme Court of the United States

SAMUEL M. SEPUYA, MD; HARRY L. JACKS; RICHARD A. EDWARDS,

Petitioners,

versus

COMMUNITY HEALTH SYSTEMS OF SAN BERNARDINO, a California non-profit public benefit corporation, fka Arrowhead Health Care Systems; COMMUNITY HOSPITAL OF SAN BERNARDINO, a California non-profit public benefit corporation; CATHOLIC HEALTHCARE WEST, SOUTHERN CALIFORNIA, a California non-profit public benefit corporation; CATHOLIC HEALTHCARE WEST, a California non-profit public benefit corporation; COMMUNITY MEDICAL MSO OF SAN BERNARDINO, INC., a California corporation; COMMUNITY HOSPITAL FOUNDATION OF SAN BERNARDINO, a California non-profit corporation, aka Community Hospital of San Bernardino Foundation; COMMUNITY CONVALESCENT, an entity of unknown type, ownership, and domicile; BALLARD REHABILITATION HOSPITAL, an entity of unknown type, ownership, and domicile; COMMUNITY HOME HEALTH, an entity of unknown type, ownership, and domicile; COMMUNITY URGENT CARE, an entity of unknown type, ownership, and domicile; COMMUNITY ADULT DAY CARE, an entity of unknown type, ownership, and domicile; REGENCY REHAB PROPERTIES, INC., a California corporation; RICHARD J. KRAMER; PHYLLIS HUGHES, RSM; JOHN R. BURGIS; ROBERT L. BURGIS; BETH O'BRIEN; FRANK L. LYMAN; BRUCE B. SATZGER; E.L. SORENSON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Mark I. Blankenship
BLANKENSHIP & ASSOCIATES
Suite 240
3685 Main Street
Riverside, CA 92501
(909)682-4887

Marina Tramontozzi
Counsel of Record
Suite 601-S
815 15th Street, N.W.
Washington, D.C. 20005
(202) 393-1070

Attorneys for Petitioners

35 pp

QUESTIONS PRESENTED FOR REVIEW

The Petitioner's case should have never been dismissed on a dismissal due to the causes of action in the verified complaint as well as the extensive documentation proving the allegations. Drastic nature of dismissal with prejudice requires action to be used only in extreme situations where there is clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailing. *GCIU Employer Retirement Fund v. Chicago Tribune Co.*, 8 F.3d 1195 (7th Cir. 1993). The Petitioner acted in good faith in submitted evidence to substantiate the material facts in his case. A dismissal deprived him of his constitutional right to a jury.

I. WHETHER THE LOWER COURT FAILED TO IMPOSE AN EFFECTIVE AND ADEQUATE REMEDY WHEN THE PETITIONER SUBMITTED SUFFICIENT DIRECT EVIDENCE TO OVERCOME A DISMISSAL ON THE ISSUE OF RACKETEERING THEREBY VIOLATING THE PETITIONER'S CONSTITUTIONAL RIGHT TO A JURY TRIAL?

II. WHETHER THE LOWER COURT INCORRECTLY WEIGHED THE DIRECT EVIDENCE OF THE RACKETEERING CONSPIRACY, AND INSTEAD, PLACED A HEAVIER BURDEN OF PROOF UPON THE PETITIONER?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL STATUTORY ORDINANCE PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 11

APPENDIX

CIRCUIT COURT OPINION 1a

DISTRICT COURT OPINION 8a

ORDER DENYING REHEARING 18a

TABLE OF AUTHORITIES

CASES

ALAN NEUMAN PRODUCTIONS, INC. V. ALBRIGHT, 862 F.2D 1388, 1392 (9TH CIR. 1988) 7
ANDERSON V. LIBERTY LOBBY, INC, 477 U.S. 242, 252, 106 S.CT. 2505 (1986) 6, 9
CHAUFFEURS, TEAMSTERS AND HELPERS V. TERRY, 110 S.CT. 1339, 1344-45 (1990) 8
CITY OF MONTEREY V. DELMONTE DUNES, 526 U.S. 687, 119 S.CT. 1624 (1999) 8
CONLEY V. GIBSON, 355 U.S. 41, 2 L.ED.2D 80, 78 S.CT. 99 (1957) 5
DIMICK V. SCHIEDT, 293 U.S. 474, 486 (1935) 8
GCIU EMPLOYER RETIREMENT FUND V. CHICAGO TRIBUNE CO., 8 F.3D 1195 (7TH CIR. 1993) 12
GRAND CHUTE V. WINEGAR, 82 U.S. 373, 375 (1872) 8
H.J.INC. V. NORTHWESTERN BELL TELEPHONE CO., 429 U.S. 229, 252-253 (1989) 7
JACOB V. NEW YORK CITY, 315 U.S. 752, 752-753 (1942) 8, 9
JONES V. SMITH, 99 F.R.D. 4 (1983) 5
KOZLOWSKI V. FERRARRA, 117 F.SUPP. 650 (1954) 6
KRONMULLER V. WEST END FIRE CO. NO. 3 FIRE DEPT., 123 FRD 170 (1988) 6
LANCASTER V. ANTELOPE VALLEY, 940 F.2D 397 (1995) 7
MARKMAN V. WESTVIEW INSTRUMENTS, INC., 517 U.S. 370, 376, 134 L.ED. 2D 577, 116 S.CT. 1384 (1995) 8
MELO-SONIC CORPORATION V. CROP, 342 F.2D 856 (3RD CIR. 1965) 5
PAGE V. WORK, 290 F.2D 323, 334 (9TH CIR. 1961), CERT. DENIED, 368 U.S. 875 (1961) 7
POINTER V. AMERICAN OIL CO., 295 F.SUPP.573 (1968) 6
SCHREIBER DISTRIBUTING CO. V. SERV-WELL FURNITURE CO., 806 F.2D 1393, 1400 10
UNITED STATES V. CARPENTER, 961 F.2D 824, 828 (9TH CIR. 1992) 10

STATUTES

28 U.S.C. SECTION 1254 1
42 USCS SECTION 1983 8
FED.R.CIV.P. 12(B) 4
FED.R.CIV.P. 8 10
FED.R.CIV.P. 9(B) 7
RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT,
18 U.S.C. SECTION 1962 ..... 2, 7

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit dated December 8, 1999, is unreported and set forth in the Appendix, p. 1a. (1999 U.S. App. LEXIS 32516). The opinion of the United States District Court for the Central District of California dated February 25, 1998 is unreported and set forth in the Appendix, p. 8a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Ninth Circuit issued its Decision in this case on December 13, 1999. Panel rehearing and rehearing en banc were timely requested. Rehearing was denied on February 16, 2000. This Petition was timely filed within 90 days of the panel rehearing denial, and is thus timely.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

Constitutional Issues

Seventh Amendment of the United States Constitution

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and not fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

Rules of Civil Procedure

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain...(2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

Statutory Issues

2. Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. Section 1962

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, Title 18, the United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce...

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or

control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section.

STATEMENT OF THE CASE

Samuel M. Sepuya, M.D., the Plaintiff-Appellant[1] (hereinafter referred to as the "Petitioner") filed suit in the United States District Court of the Central District of California against Community Health Systems of San Bernardino and other medical groups and financial beneficiaries, the Respondents (hereinafter referred to as the "Hospital"), parties to a proposed merger of several health care providers, claiming the merger was the result of an industry-wide civil conspiracy. The gravamen of the Petitioner's complaint is that the proposed merger of several California health care providers was the result of an industry-wide civil conspiracy. The complaint alleged fraud, conspiracy, violations of California Corporate Code,

[1] Harry L. Jacks, M.D. and Richard A. Edwards, M.D. were named Plaintiffs in the original complaint.

securities fraud, civil rights violations, conversion and breach of fiduciary duty.

On February 24, 1998, the District Court issued a minute order granting the various motions to dismiss the First Amended Complaint without leave to amend and granting the Hospital's motion for sanctions. On March 12, 1998, the District Court dismissed the case under Fed.R.Civ.P. 12(b), refused to grant leave to amend the complaint, refused to reconsider its decision and imposed sanctions on Petitioner's counsel; judgment was entered on March 25, 1998. On May 4, 1998 the District Court denied the Petitioner's Motion for Reconsideration and on December 15, 1998, the court denied the Petitioner's motion for relief from judgment.

On April 16, 1998, the Petitioner filed an appeal to the Ninth Circuit Court of Appeals and the appellate court affirmed the District Court's opinion since the Petitioner failed to allege facts sufficient to support a claim for relief under RICO and they failed to plead facts demonstrating the alleged pattern of racketeering activity with sufficient specificity. As a result, the Petitioner filed an appeal to the Circuit Court of Appeals for the Ninth Circuit. The Circuit Court affirmed the District Court's decision on December 13, 1999 on all counts, finding no abuse in discretion in the lower court's refusal to allow leave to amend, denial of the motion to reconsider, and order of sanctions.

The Petitioner has filed a Petition for Certiorari to this Honorable Supreme Court based upon the issues and argument presented herein.

REASONS FOR GRANTINGTHE WRIT

I. THE PETITIONER SUBMITTED SUFFICIENT EVIDENCE TO OVERCOME THE STANDARD FOR A MOTION FOR DISMISSAL IN A RICO STATUTE VIOLATION CASE BY PROVING WITH DIRECT EVIDENCE THAT THE HOSPITAL ACTED WITH FRUAD AND CONSPIRED TO COMMIT FRAUD AND BREACHED THEIR FIDUCIARY DUTIES AND THEREBY VIOLATING THE PETITIONER'S CONSTITUTIONAL RIGHT TO A JURY TRIAL.

If this Court determines that the Petitioner's Writ of Certiorari should be granted, the Court must determine the liability of the Hospital and an adequate remedy for the Petitioner in situations where there is clear and convincing evidence of conspiracy and fraud. Moreover, it should be the role of the jury to determine whether the evidence proved the causes of action. The District Court's and Circuit Court's exercise of judicial discretion, in refusing to hear issues dealing with fraud and conspiracy and RICO violations, is in direct conflict with Petitioner's right to a trial by jury on these issues.

Dismissal with prejudice of a party's complaint is a harsh sanction to be resorted to only in extreme cases, and is within the court's sound discretion; court must give full regard for severity of the sanction, granting dismissal sparingly and only when less drastic alternatives have been explored. *Jones v. Smith*, 99 F.R.D. 4 (1983). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957); *Melo-Sonic Corporation v. Crop*, 342 F.2d 856 (3rd Cir. 1965). A

summary judgment motion is appropriate when there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc*, 477 U.S. 242, 252, 106 S.Ct. 2505 (1986) A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* A fact is "material" if a dispute over it might affect the outcome of the suit under the governing law. *Id.* No matter how likely it may seem that a pleader will be unable to prove his case, he is entitled, upon averring claim, to opportunity to prove his case, and complaint is not subject to dismissal unless it appears to certainty that Plaintiff cannot possibly be entitled to relief under any set of facts which could be proved in support of its allegations. *Pointer v. American Oil Co.*, 295 F.Supp.573 (1968). Courts may not dismiss complaint for insufficiency unless it clearly appears that by no stretch of the imagination is plaintiff entitled to any relief for claims asserted in his complaint. *Kozlowski v. Ferrarra*, 117 F.Supp. 650 (1954). Even if it is doubtful that plaintiff would ultimately prevail, if plaintiff colorable states facts which, if proven, would entitled him relief, motion to dismiss for failure to state a claim should not be granted. *Kronmuller v. West End Fire Co. No. 3 Fire Dept.*, 123 Frd 170 (1988).

The Petitioner's case should have never been disposed of upon a summary judgment motion. The lower courts' actions were such an abuse of discretion, because the Petitioner by way of depositions, affidavits and other competent evidence showed a substantial amount of evidence to prove their claim. The verified complaint alone consisted of over 350 pages which included evidence of the causes of actions. The Petitioner's claims have merit since they were plead with particularity. If there was any alleged defect in the verified complaint, the District Court should have allowed it to be amended because justice has been defeated.

In order to prevail on a claim alleging a RICO[2] violation, a plaintiff must prove that: (1) the methods, purposes, results and participants involved in the racketeering were sufficiently related; and (2) the acts were committed over a substantial period of time and threaten a continuing pattern of racketeering. *H.J.Inc. v. Northwestern Bell Telephone Co.*, 429 U.S. 229, 252-253 (1989). Also, where the plaintiff claim is based on fraud, Fed.R.Civ.P. 9(b) requires that the circumstances constituting fraud be stated with particularity. *Alan Neuman Productions, Inc. v. Albright,* 862 F.2d 1388, 1392 (9th Cir. 1988). A plaintiff needs to allege the time, place and manner of all averments. *Lancaster v. Antelope Valley,* 940 F.2d 397 (1995).

Since the summary judgment was improperly granted, the Petitioner's constitutional right to a jury trial was violated. *See Page v. Work*, 290 F.2d 323, 334 (9th Cir. 1961), cert. denied, 368 U.S. 875 (1961). The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from taking away the role of the jury. Under the United States Supreme Court's precedents as to whether there is a statutory or constitutional right to a jury trial on a civil claim under a federal statute, before the court inquiries into the applicability of the federal constitution's Seventh Amendment, the court must first ascertain whether a construction of the statute if fairly possible by which the constitutional question may be avoided; however, where the court declines to find a jury right under the statute, the court must reach the constitutional question. *City of Monterey v.*

---

[2] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Section 1962.

DelMonte Dunes, 526 U.S. 687, 119 S.Ct. 1624 (1999). Consistent with the textual mandate of the federal constitution's Seventh Amendment that the right to a jury trial be preserved in suits "at common law," the United States Supreme Court, in interpreting the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was; and (2) if the action in question belongs in the law category, then asks whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. *Id*; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995).

Since the RICO statute does not give mandatory trial by jury,[3] then, the Seventh Amendment is applicable and the facts must go before a jury. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); Chauffeurs, Teamsters and Helpers v. Terry, 110 S.Ct. 1339, 1344-45 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872*); Jacob v. New York City,* 315 U.S. 752, 752-753 (1942). The right of jury trial in civil cases at common law is a …right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". *Id.*

---

[3] In the *DelMonte Dunes* case, the Supreme Court stated that since 42 USCS Section 1983 does not give a mandatory jury trial, a Seventh Amendment analysis must be done.

This Honorable Court has been highly protective of the jury's role:

> "'Credibility determinations, the weighing of the evidence, and the drawing of inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment...The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor

Anderson, supra, at 255.

It would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence and judge the credibility of witnesses. *Id.*

This Honorable Court must grant this Petition for Certiorari so that it may clarify the standard for a motion for summary judgment where the RICO statute does not give an automatic jury trial and the Seventh Amendment is applicable.

II. THE LOWER COURT INCORRECTLY WEIGHED THE DIRECT EVIDENCE OF FRAUD AND CONSPIRACY, AND INSTEAD, PLACED A HEAVIER BURDEN OF PROOF UPON THE PETITIONER.

The purpose of the complaint was not to encompass every detail and factual proof, but instead provide the information necessary to put the Hospital on notice of the claims raised in a concise manner. However, the lower courts erroneously ruled that the Petitioner had failed to plead facts that would demonstrate the alleged pattern of

racketeering activity with sufficient specificity, as required by Federal Rule of Civil Procedure 9(b). *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400)9th Cir. 1986). The court also found that the plaintiffs had failed to specifically plead "a pattern of racketeering activity" consisting of at lest two predicate acts. *United States v. Carpenter*, 961 F.2d 824, 828 (9th Cir. 1992). *Sepuya v. Community Health, et.al.*, 1999 U.S.App. LEXIS 32516 (1999).

The Petitioner filed a Verified Compliant consisting over 350 pages. The federal rules of civil procedure only require a short and plain statement of a claim which means conciseness and understandibility. Fed.R.Civ.P. 8. In potentially complicated litigation, and particularly in cases involving RICO issues, the facts may become more complicated. But the Petitioner met his burden required under the rules of civil procedure. In fact, the Petitioner gave 279 incidences and facts proving his cause of action. The Petitioner proved that the Hospital made representations that they knew were false and would deceive and cause damages to the Petitioner. The Petitioner explained a number of transactions that took place over a course of time that were fraudulent. The Verified Complaint clearly sets forth facts that support claims for conversion, conspiracy, violations of California Corporations Code, breach of fiduciary duty.

Justice precludes the Ninth Circuit's and the District Court's opinion since the courts placed a heavy burden of proof upon the Petitioner that is not required under the federal rules of civil procedure.

CONCLUSION

The Ninth Circuit and the Central District Court of California have placed a high burden of proof upon the Petitioner to overcome a summary judgment motion. The Court should grant *certiorari* to review this important matter, clarify the parties burden, order a proper remedy for the Petitioner, reverse the Ninth Circuit's and District Court's opinions, and order that the Petitioner had a constitutional right to a jury trial since there was proven conspiracy and fraud.

Respectfully Submitted,
Marina Tramontozzi
Counsel of Record
815 15th Street, N.W.
Suite 601
Washington, D.C. 20005
(202) 393-1070

(Any footnotes trail end of each document)

No. 98-55813

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SAMUEL M. SEPUYA, MD; HARRY L. JACKS; RICHARD A. EDWARDS, Plaintiff-Appellant, v. COMMUNITY HEALTH SYSTEMS OF SAN BERNARDINO, a California non-profit public benefit corporation, fka Arrowhead Health Care Systems; COMMUNITY HOSPITAL OF SAN BERNARDINO, a California non-profit public benefit corporation; CATHOLIC HEALTHCARE WEST, SOUTHERN CALIFORNIA, a California non-profit public benefit corporation; CATHOLIC HEALTHCARE WEST, a California non-profit public benefit corporation; COMMUNITY MEDICAL MSO OF SAN BERNARDINO, INC., a California corporation; COMMUNITY HOSPITAL FOUNDATION OF SAN BERNARDINO, a California non-profit corporation, aka Community Hospital of San Bernardino Foundation; COMMUNITY CONVALESCENT, an entity of unknown type, ownership, and domicile; BALLARD REHABILITATION HOSPITAL, an entity of unknown type, ownership, and domicile; COMMUNITY HOME HEALTH, an entity of unknown type, ownership, and domicile; COMMUNITY URGENT CARE, an entity of unknown type, ownership, and domicile; COMMUNITY ADULT DAY CARE, an entity of unknown type, ownership, and domicile; REGENCY REHAB PROPERTIES, INC., a California corporation; RICHARD J. KRAMER; PHYLLIS HUGHES, RSM; JOHN R. BURGIS; ROBERT L. BURGIS; BETH O'BRIEN; FRANK L. LYMAN; BRUCE B. SATZGER; E.L. SORENSON, Defendants-Appellees.

December 8, 1999[2], Submitted, Pasadena, California

December 13, 1999, Filed

NOTICE:
RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL:
For SAMUEL M. SEPUYA, MD, HARRY L. JACKS, RICHARD A. EDWARDS, Plaintiffs - Appellants: Mark I. Blankenship, Esq., BLANKENSHIP & ASSOCIATES, Riverside, CA.

For COMMUNITY HEALTH SYSTEMS OF SAN BERNARDINO, COMMUNITY HOSPITAL OF SAN BERNARDINO, COMMUNITY MEDICAL MSO OF SAN BERNARDINO, INC., COMMUNITY HOSPITAL FOUNDATION OF SAN BERNARDINO, COMMUNITY CONVALESCENT, COMMUNITY HOME HEALTH, COMMUNITY URGENT CARE, COMMUNITY ADULT DAY CARE, FRANK L. LYMAN, BRUCE B. SATZGER, E. L. SORENSON, Defendants - Appellees: Dennis S. Diaz, Esq., SONNENSCHEIN NATH & ROSENTHAL, Los Angeles, CA.

For COMMUNITY HEALTH SYSTEMS OF SAN BERNARDINO, COMMUNITY HOSPITAL OF SAN BERNARDINO, Defendants - Appellees: John E. Walker, SONNENSCHEIN NATH & ROSENTHAL, Los Angeles, CA.

For CATHOLIC HEALTHCARE WEST, SOUTHERN CALIFORNIA, CATHOLIC HEALTHCARE WEST, RICHARD J. KRAMER, [*2] PHYLLIS, HUGHES, RSM;

JOHN R. BURGIS; ROBERT L. BURGIS; BETH O'BRIEN, Defendants - Appellees: Barry S. Landsberg, Esq., MANATT PHELPS & PHILLIPS, Los Angeles, CA.

For BALLARD REHABILITATION HOSPITAL, REGENCY REHAB PROPERTIES, INC., Defendants - Appellees: Thomas B. Croke, IV, Esq., HOOPER, LUNDY & BOOKMAN, Los Angeles, CA.

JUDGES:
Before: BRUNETTI and TASHIMA, Circuit Judges, and SCHWARZER,[3] District Judge.

OPINION:

MEMORANDUM[1]

This is an appeal from the district court's grant of the defendants' motions to dismiss, denial of the plaintiffs' motion for reconsideration, and award of sanctions against plaintiffs' counsel. This appeal arises from an underlying action for damages, declaratory and injunctive relief for violations of RICO, and for assorted other state claims including fraud, conspiracy to commit fraud, conversion, conspiracy to commit conversion, violation of California Corporations law as it applies to nonprofit corporations, conspiracy to violate California Corporations law, breach of fiduciary duty, and conspiracy to breach a fiduciary duty.[4] The gravamen of appellants' complaint is that the proposed merger of several California health care providers was the result of an industry-wide criminal conspiracy. The members of the alleged conspiracy, the defendants in this action, are dozens of health care providers, corporate officers, and local physicians connected with the proposed affiliation.

On February 24, 1998, the district court issued a minute order granting the various motions to dismiss the First

Amended Complaint without leave to amend, and granting the defendants' motion for sanctions.[5] The minute order also adopted the tentative ruling issued by the district judge. Although the district court discussed the issue of standing in its tentative ruling, it is clear that the ruling addresses at length the substance of the arguments presented, and dismisses the case on the merits. On March 12, 1998, the district court issued a formal order dismissing the case and awarding sanctions against plaintiffs' counsel. On March 25, 1998, the district court entered judgment against the plaintiffs stating specifically that "the action be dismissed with prejudice on the merits."

On April 27, 1998, the court issued a minute order denying the plaintiffs' motion for reconsideration, and adopting the tentative ruling of the court on that motion. On May 4, 1998, the district court's denial of the plaintiffs' motion for reconsideration was entered. On December 15, 1998, the district judge denied the plaintiffs' motion for relief from judgment.

On April 16, 1998, the plaintiff filed a notice of appeal from the March 25, 1998 order. Plaintiffs then filed an amended notice of appeal to include the denial of the motion for reconsideration on June 3, 1998. The appeal is therefore timely and this Court exercises jurisdiction pursuant to 28 U.S.C. § 1291.

In its tentative ruling, adopted February 24, 1998, the district court found that the plaintiffs had failed to allege facts sufficient to support a claim for relief under RICO. The court found that plaintiffs had failed to plead facts that would demonstrate the alleged pattern of racketeering activity with sufficient specificity, as required by Federal Rule of Civil Procedure 9(b). Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1400 (9th Cir. 1986); See also Lancaster Community Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 405 (9th Cir. 1991). The court also found that

the plaintiffs had failed to specifically plead "a pattern of racketeering activity" consisting of at least two predicate acts. United States v. Carpenter, 961 F.2d 824, 828 (9th Cir. 1992); United States v. Walgren, 885 F.2d 1417, 1424 (9th Cir. 1989).

Plaintiffs' supplemental state law claims also failed to survive the motion to dismiss. As to the claims of fraud and conspiracy to commit fraud, the district court held that the plaintiffs failed to properly plead any of the required elements, and the claims must therefore be dismissed. As to the claims of conversion and conspiracy to convert, the district court found that the plaintiffs did not allege that the hospital assets in question were the personal property of the plaintiffs, and the conversion claims must therefore fail. As to the violations of the California Corporations Code, the district court held that the plaintiffs failed to make clear to the court what violations were alleged, and that the plaintiffs have no standing to sue under the Code. Finally, as to the breach of fiduciary responsibility and conspiracy to breach fiduciary responsibility claims, the court held that the plaintiffs failed to plead the existence of a fiduciary relationship, and these claims, too, are unable to withstand the motion to dismiss.

The district court also denied the plaintiffs leave to amend the First Amended Complaint, stating that amendment would be futile. The district court granted the defendants' motion for sanctions, finding that the plaintiffs' counsel acted in bad faith and wasted the time of the court by his conduct in connection with the originally scheduled motion to dismiss hearing.

The district court's grant of a Rule 12(b) motion to dismiss is reviewed de novo. Arnett v. California Pub. Employees Retirement Sys. (PERS), 179 F.3d 690, 694 (9th Cir. 1999). This Court, having reviewed the record, affirms

the district court's dismissal on the merits for the reasons stated by the district court.

We review the district court's denial of leave to amend for abuse of discretion. Griggs v. Pace Amer. Group, Inc., 170 F.3d 877, 879 (9th Cir. 1999). Here, the denial of leave to amend was well within the discretion of the district court. Likewise, we review the district court's award of sanctions for abuse of discretion, and find that the district court did not abuse its discretion by imposing sanctions on plaintiffs' counsel. Barber v. Miller, 146 F.3d 707, 709 (9th Cir. 1998).

The district court denied the plaintiffs' motion for reconsideration because the motion failed to introduce new evidence or advance new legal arguments. We review the denial of the motion for reconsideration for an abuse of discretion. Minnesota Mut. Life Ins. Co. v. Ensley, 174 F.3d 977, 987 (9th Cir. 1999). We find that the district court did not abuse its discretion in denial of the reconsideration motion.

AFFIRMED.

----------Footnotes----------

n1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

n2 The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

n3 Hon. William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

n4 Two other claims appear to have been abandoned on appeal: a civil rights claim and a securities fraud claim. The civil rights claim was dismissed because there was no allegation of state action. The securities fraud claim was dismissed because none of the transactions complained of

involved the sale of regulated securities. The principal defendants are, in fact, non-profit public benefit corporations who do not issue stock.

n5 The district court also denied a rather mysterious plaintiffs' "motion to determine whether or not defendants and their legal counsel violated California law as to the December 11, 1997 Annual Corporate Meeting." The district court denied the motion because it found no authority in the federal rules, local rules or caselaw by which the court could consider such a motion. Although this motion was included in the order from which the plaintiffs appeal, the issue was not briefed by appellants, and is therefore deemed waived.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE RULING

Case Number: CV 97—8873 WJR (VAPx)
Docket Number:

Title: Dr. Samuel Sepuya et al. v., Community Health Systems of San Bernardino

Date: February 25, 1998

Nature of Motion: Defendants' 3 Motions to Dismiss;

Plaintiffs' Motion to Determine Whether or Not Defendants and theiLegal Counsel Violated California Law at the December 11, 1997 Annual Corporate Meeting of Community Health Systems of San Bernardino, Inc.";

Defendants' 2 Motions for Sanctions

HON. WILLIAM J. REA, JUDGE . Marva Dillard, Deputy Clerk.

TENTATIVE RULING

The Court is inclined to GRANT Defendants' Motions to Dismiss. The Court is not inclined to grant leave to amend.

The Court is inclined to DENY Plaintiffs' "Motion to Determine Whether or Not Defendants and their Legal Counsel Violated California Law at the December 11, 1997 Annual Corporate Meeting of Community Health Systems of San Bernardino, Inc."

The Court is inclined to GRANT both of Defendants'

Motions for Sanctions against attorney Mark Blankenship.

DISCUSSION

I. DEFENDANTS' THREE MOTIONS TO DISMISS

Three groups of Defendants have filed three separate Motions to Dismiss with various other Defendants joining in the Motions. The three Motions essentially make the same arguments. The Court has considered these arguments as a. whole and will not discuss each Motion separately. The Court is persuaded by these Motions that the entire First Amended Complaint should be dismissed pursuant td Federal Rule of Civil Procedure 12(b)(6) because Plaintiffs have no standing and Plaintiffs have failed to state a claim upon which relief can be granted.

A. STANDING

The basis for the First Amended Complaint is that CHSB and the other Defendants have committed various alleged breaches of charitable trust regarding the operations of the non-profit CHSB and the proposed affiliation with CHW. None of the three Plaintiffs have standing to bring this suit.

Plaintiff Sepuya is a doctor practicing at CHSB and a corporate member. Plaintiff Edwards was a CHSB patient who may plan future surgery there. Plaintiff Jack resides in the CHSB market area. None have ownership interest in any of the defendant entities. None have asserted a particularized injury. A general interest in preventing a suspected wrongdoing does not confer standing. Allen v. Wright, 468 U.S. 737, 754 (1984).

Plaintiff Sepuya's corporate membership of CHSB does-not confer standing upon him. He alleges no injury to himself. To the-extent he alleges injury to the corporation by violation of California law, the California Corporations Code precludes him from bringing suit based on his status as a corporate member.

California Corporations Code Sec 5142 states that "to enjoin, collect, obtain damages for or to otherwise remedy a breach of charitable trust", only "[t]he Attorney General, or any person granted relator status by the Attorney General" may bring the action, unless the plaintiff can allege that he is an officer or director of the corporation or is a person with "reversionary, contractual, or property interest in the assets subject to charitable trust." California Corporations Code Sec. 5233 makes a similar standing limitation for Plaintiffs' allegations of self-dealing by CHSB and its employees and affiliates. Plaintiff Sepuya has brought this matter to the attention of the Attorney General but the Attorney General has apparently declined to investigate.

Plaintiffs are also precluded by state law from seeking derivative relief on behalf of CHSB. California Corporations Code § 5710(b) (2) requires a pre-lawsuit written demand and notificaton to the CHSB board. Plaintiffs needed to have given the CHSB board a written explanation of their claims before filing suit.

Plaintiffs appear to be attempting to make a civil rights claim based on the CHW's purported efforts to implement the anti reproductive choice policies of the Roman Catholic Churche Plaintiffs however cannot show that they have suffered an injury in fact nor that there is a "very significant possibility that future harm will ensue." U.S. Const., Art. III; Gladstone Realtors V. Village of Belwood, 441 U.S. 91 (1979).

It is clear to this Court that none of the three Plaintiffs have standing to bring any of the claims brought in the First Amended Complaint

B. 12(b) (6) Dismissal

In resolving a 12(b) (6) motion to dismiss for failure to state a claim, the Court must take all material allegations in the complaint as true and construe the complaint in the light most favorable to the plaintiff. NL Industries. Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). The Court should not dismiss a complaint "unless it appears beyond doubt that the plaintiff can prove noset of facts in support of his claim which would entitle him to relief.". Moore v. City of Costa Mesa, 866 F.2d 260, 262 (9th Cir. 1989) (citing Conley v. Gibson, 355 U.S. 41, 45—56 (1957)). The Court should, however, dismiss a complaint if it lacks cognizable legal theory and does not contain actionable facts. Balistreri. v. Pacifica Police Dept., 901 F.2d 696 (9th Cir. 1988).

1. Federal Claims

Plaintiffs have failed to allege facts sufficient to support claims for relief for any of the three federal claims: RICO violation, civil rights violations, and securities fraud. All federal claims must be dismissed.

a. RICO

Plaintiffs attempt to plead a cause of action for racketeering fraud under RICO. Plaintiffs have yet to comply with the RICO Order issued by Judge Tevrizian before this case was re-assigned here. At the December 11, 1997 hearing on Plaintiffs application for a temporary restraining order, Plaintiffs counsel acknowledged that he had received the Order and was in the process of complying. However, this

Court has received nothing from him.

Regardless Plaintiffs' RICO claim must be dismissed for failure to state a claim upon which relief can be granted. To plead a proper RICO claim, a plaintiff must "plead the circumstances of the fraudulent acts that form the alleged pattern of racketeering activity with sufficient specificity pursuant to Fed. R. Civ. P. 9(b)." Schreiber Distributing Co. v. Serve-Well Furniture Co., 806 F.2d 1393, 1400 (9th Cir. 1986). Rule 9(b) "requires a pleader of fraud to detail with particularity the time, place, and manner of each act of fraud, plus the role of each defendant in each such scheme." Lancaster Community Hospital v. Antelope Valley Hospital District, 940 F.2d 395, 405 (9th Cir. 1991). Further, in a RICO action with multiple defendants, "specification of the 'role of each defendant in the fraud'" is essential. Comwest, Inc. v. American Operator Services, Inc., 765 F.Supp. 1467, 1471 (C.D. Cal. 1991) (quoting Hokama v. E.F. Hutton & Co., 566 F. Supp. 636, 645 (C.D. Cal 1983)).

Plaintiffs' rambling Amended Complaint pleads no facts which identify the details of the allegedly fraudulent conduct with the specificity required. Plaintiffs' Amended Complaint makes many vehement allegations of wrongdoing but does not present the required factual allegations needed to maintain a RICO claim.

Further, to state an actionable claim under 18 U.S.C. Sec. 1962(c), Plaintiffs must plead specifically "a pattern of racketeering activity" consisting of at least two predicate criminal acts. United States v. Walgren, 885 F.2d 1417, 1424 (9th Cir. 1989). Plaintiffs' Amended Complaint fails to successfully plead even one predicate act and certainly no pattern of them.

The above paragraphs articulate only two of the fatal in Plaintiffs' RICO claim. However, the above sufficient

grounds to dismiss the RICO claim pursuant to FRCP 12 (b) (6).

b. Civil Rights

Plaintffs allege a violation of civil rights under 28 U.S.C. § 1343. However, 28 U.S.C. S 1343 serves only to confer jurisdictio on this Court to entertain civil rights claims; it does not provide Plaintiffs any cause of action. The complaint has been amended once and is no less deficient than the original. This claim must be dismissed.

The Court should not have to guess the federal statute upon which Plaintiff is attempting to base a claim. However, the Court notes that 42 U.S.C. Sec. 1983, which does create a cause of action for civil rights violations, requires that the defendant act "under color of" state law in impinging on the plaintiff's civil rights. Here, Plaintiffs have made absolutely no allegation of state action. Regardless, one cannot sue a private hospital in a Section 1983 suit because the actions by the hospital are considered private conduct and not state action. Taylor v. St. Vincent's Hospital, 523 F.2d 75, 77 (9th Cir. 1975).

c. Securities Fraud

Plaintiffs' federal securities fraud and conspiracy to commit securities fraud claims are nonsensical. None of the transactions complained of involve the sale of any regulated securities. Defendants CHSB and CHW are not—for-profit public benefit corporations and they do not issue stock or any other type of securities. This claim must be dismissed.

2. State Law Claims

Plaintiffs have failed to allege facts sufficient to support claims for relief for any of the pendant state claims. These claims must be dismissed also.

a. Fraud and Conspiracy to Commit Fraud

Plaintiffs make general and conclusory allegations that Defendants acted fraudulently. Under California law, however, common law fraud and deceit must be pled with particularity. Goldrich v. Natural Y Surgical Specialties, Inc., 25 Cal. App. 4th 772 (1994). The elements of a fraud and deceit claim are:

(1) representation;
(2) falsity;
(3) knowledge of the falsities;
(4). intent to deceive;
(5) reliance and resulting damage; and
(6) causation.

Lesperance v. North America Aviation, Inc., 217 Cal. App. 2d 336, 345. Plaintiffs have not pled any of these elements nor pled them with specificity.

In order to plead conspiracy to commit fraud and deceit, Plaintiffs must properly plead the underlying fraud and deceit,Manor Invest Co. V. F.W. Woolworth, .159 Cal. App. 3d 586, 598 (1984), overruled on other grounds, Applied Equipment Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 505 (1994). Both the fraud and deceit and the conspiracy claim must be dismissed.

b. Conversion and Conspiracy to Convert

Plaintiffs make general and conclusory allegations that hospital assets were converted. Conversion, under California law, is the wrongful exercise of dominion over the personal property of another. 5 Witkin Summary of California Law, 707-08 (9th Ed. 1988). Plaintiffs have not alleged that the hospital assets are their personal property.

The conversion claim must be dismissed and, for the obvious reason, the conspiracy to convert claim must also be dismissed.

c. Violations of California Corporation Code

Plaintiffs make general and conclusory allegations of violations of the California Corporation Code. Plaintiffs do not make clear to the Court which codes were violated and by what conduct. Further, California law is clear that Plaintiffs have no standing under the California Corporation Code. This claim
must be dismissed

2. State Claims

d. Breach of Fiduciary Responsibility and Conspiracy to Breach Fiduciary Responsibility

Plaintiffs make general and conclusory allegations as to a breach of fiduciary responsibility. Such a claim requires Plaintiffs to plead the existence of fiduciary relationship in the first place. Rickel V. Schwinn Bicycle Co., 144 Cal. App. 3d 648, 654 (1983). Plaintiffs have pled no such facts. This claim and the related conspiracy claim must be dismissed.

C. No Leave to Amend

Plaintiffs have amended their Complaint once already. Leave to amend a second time would be entirely futile in this case. "Valid reasons for denying leave to amend include . . . bad faith, prejudice and futility." California Architectural Building Productes, Inc. v. Franciscan Ceramics Inc., 818 F.2d 1466, 1472 (9th Cir. 1987). Amendment would be futile because Plaintiffs have no standing to bring suit on any claim.

II. PLAINTIFFS' "MOTION TO DETERMINE WHETHER OR NOT DEFENDANTS AND THEIR LEGAL COUNSEL VIOLATED CALIFORNIA LAW AT THE DECEMBER 11, 1997 ANNUAL CORPORATE MEETING OF COMMUNITY HEALTH SYSTEMS OF SAN BERNARDINO, INC."

Plaintiffs provide the Court with no authority under the Federal Rules of Civil Procedure, case law, or Local Rules by which the Court can make a determination and subsequent declaration to the legality of the December 11, 1997 corporate meeting. Further since the Court must dismiss this entire action for failure to state a claim upon which relief can be granted, the Court need not consider this nonsensical motion.

III. DEFENDANTS MOTION FOR SANCTIONS

Defendants CHW, CHWSC, Kramer, Burgis, Johnson, Hughes, and O'Brien move the Court for sanctions pursuant to 28 U.S.C.. Sec. 1927 in the amount of $2,997.50 against Mark Blankenship, counsel for Plaintiffs. Defendants CHS, CHSB, and their affiliates and employees also move for sanctions against Blankenship in the amount of $1,905.00 pursuant to 28 U.S.C. Sec 1927. Both Motions are joined by Defendants Regency Rehab Properties and Ballard Rehabilitation Hospital. Plaintiffs' attorney has filed no opposition nor a notice of non—opposition, as required by the Local Rule 7.6 Defendant CHW and its fellow movants filed a "reply" in which they point out the lack of response by Plaintiffs and request an additional $327.50 under the Court's authority to sanction, pursuant to Local Rule 27. That sum represents the cost for preparing the "reply."

The Court should grant both Motions, including CHW's request for an additional $327.50. Pursuant to 28

U.S.C. Sec. 1927:

> Any attorney or other person admitted to conduct cases in any court of the Untied States or any Territory thereof who so mutliplies the proceedings in any case unreasonably and vexatiously may be required by the Court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Defendants' motion to dismiss the original complaint was scheduled to be heard on Monday, January 12, 1998. On Friday, January 9, 1998, Mark Blankenship filed a First Amended Complaint. That First Amended Complaint, with the 52 exhibits, exceeds 600 pages. Mr. Blankenship did not notify the defense attorneys' that the motion had been taken off calendar due to the filing of the Amended Comlaint. A crowd of defense attorneys appeared on Monday morning prepared to argue the motion.

Mr.. Blankship clearly acted in bad faith. He himself appeared on Monday and he told the Court that he had not-bothered to notify the other attorneys. Further, Mr. Blankenship made several references to the fact that Marva was out on that Friday when he filed the Amended Complaint, implying that her absense is the reason why he could not give notice to the other attorneys.

There is absolutely no reason why Mr. Blankenship could not have phoned the defense attorneys on Friday or at any point when he knew he would be filing an amended complaint. He wasted the time of the attorneys for the many, many parties he has sued. He also wasted the time of the Court.

This Court should grant the sanctions requested in both Motions.

No. 98-55813

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SAMUEL M. SEPUYA, MD; HARRY L. JACKS; RICHARD A. EDWARDS, Plaintiff-Appellant, v. COMMUNITY HEALTH SYSTEMS OF SAN BERNARDINO, a California non-profit public benefit corporation, fka Arrowhead Health Care Systems; COMMUNITY HOSPITAL OF SAN BERNARDINO, a California non-profit public benefit corporation; CATHOLIC HEALTHCARE WEST, SOUTHERN CALIFORNIA, a California non-profit public benefit corporation; CATHOLIC HEALTHCARE WEST, a California non-profit public benefit corporation; COMMUNITY MEDICAL MSO OF SAN BERNARDINO, INC., a California corporation; COMMUNITY HOSPITAL FOUNDATION OF SAN BERNARDINO, a California non-profit corporation, aka Community Hospital of San Bernardino Foundation; COMMUNITY CONVALESCENT, an entity of unknown type, ownership, and domicile; BALLARD REHABILITATION HOSPITAL, an entity of unknown type, ownership, and domicile; COMMUNITY HOME HEALTH, an entity of unknown type, ownership, and domicile; COMMUNITY URGENT CARE, an entity of unknown type, ownership, and domicile; COMMUNITY ADULT DAY CARE, an entity of unknown type, ownership, and domicile; REGENCY REHAB PROPERTIES, INC., a California corporation; RICHARD J. KRAMER; PHYLLIS HUGHES, RSM; JOHN R. BURGIS; ROBERT L. BURGIS; BETH O'BRIEN; FRANK L. LYMAN; BRUCE B. SATZGER; E.L. SORENSON, Defendants-Appellees.

February 16, 2000, Filed

JUDGES:
Before: BRUNETTI and TASHIMA, Circuit Judges, and SCHWARZER,District Judge.

ORDER

The petition for rehearing and suggestion for rehearing en banc are denied